Consumers Health Forum of Australia

25 January 2013

Compulsory Licensing of Patents
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

Dear Sir/Madam

Compulsory Licensing of Patents: Draft Report

The Consumers Health Forum of Australia (CHF) welcomes the opportunity to provide a submission in response to the draft report prepared as part of the Productivity Commission's inquiry into the compulsory licensing of patents.

CHF is the national peak body representing the interests of Australian healthcare consumers. CHF works to achieve safe, quality, timely healthcare for all Australians, supported by accessible health information and systems.

CHF has limited expertise in patent law, but has a strong interest in how the operation of patents may affect access to healthcare. CHF is aware of ongoing public debate about the impact of patents on access to healthcare, particularly in relation to gene patenting and pharmaceutical patents. We have provided input to several recent consultation processes, emphasising the need for patents to operate in a way that protects the interests of consumers while also ensuring that there is sufficient incentive for the development of innovative products through a period of market exclusivity.

CHF has reviewed the draft report, and is supportive of its findings and recommendations. We have a particular interest in the sections of the report that address how compulsory licensing and other provisions can support access to healthcare, and some brief comments in relation to these are provided below.

CHF supports the Productivity Commission's draft recommendations to clarify the criteria for the granting of a compulsory license, particularly the proposal to move to a public interest test rather than the current 'reasonable requirements of the public' test. We note the assessment in the draft report that the current wording in relation to this test '*appears to conflate the interests of individual trades or industries with those of the broader public*', and that:

> *The Commission considers that the conflation of the reasonable requirements of the public with the interests of Australian industry is problematic. The purpose of the reasonable requirements of the public test should not be to protect the interest of a particular trade or industry, if this comes at a net cost to the broader community.*

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On this basis, we support that the Productivity Commission's recommendation that the Australian Government should seek to replace the current 'reasonable requirements of the public' test for compulsory licensing with a public interest test, noting that public interest would be assessed having regard to factors including benefits to consumers and the licensee from the licensee's access to the invention, and the longer term impacts on community well-being.

CHF also welcomes the draft recommendations that aim to clarify that Crown use provisions can be applied to healthcare related patents. We note the current uncertainty about whether Crown use provisions can be used for healthcare related patents, including whether Crown use can be utilised by non-government healthcare providers, given that it can be used only 'for the services of a government'; whether Crown use can be utilised by State governments for services outside the State; and whether State governments have to invoke Crown use individually, rather than coordinating their actions. We welcome the draft recommendation that aims to remove this uncertainty by amending the Patents Act 1990 so that it is clear that Crown use can be invoked for the provision of a service that the Australian, State or Territory governments have *primary responsibility for providing or funding*.

CHF has also reviewed Chapter 9 of the draft report, which outlines alternative mechanisms to compulsory licensing provisions as they might apply to healthcare. While we emphasise the importance of consumer access to patented healthcare technologies, we agree with the Productivity Commission's assessment that there is not a compelling case for alternative, healthcare-specific approaches because the benefits are likely to be small, incentives for health-related innovation could be reduced, and the proposed reforms to Crown use provisions should increase clarity about their use in relation to healthcare-related patents.

In addition, CHF has considered the draft findings and recommendations relating to awareness-raising measures. While we consider that access to clear and unbiased information on compulsory licensing provisions is important, we recognise that there is likely to be a limited need for public awareness of these provisions, and therefore support the proposed strategy of the development of a plain English guide to be made available on the IP Australia website. This guide should be written so that it can be understood by those with limited knowledge of patent law, and, given the widespread interest in healthcare related issues such as gene patenting, it may be worth including information in the guide regarding how compulsory licensing provisions could be applied to healthcare related patents.

CHF appreciates the opportunity to provide a submission to this consultation. If you would like to discuss these comments in more detail, please contact CHF Deputy Chief Executive Officer, Anna Greenwood.

Yours sincerely

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